United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals, District of Columbia

Original No. 1091.

April Term, 1925.

243

FRANCIS J. LUKENS,
Appellant.

vs.

COMMERCIAL NATIONAL BANK OF WASHINGTON, a corporation, CHRISTOPHER H. POPE, and WILTON J. LAMBERT, Trustees,
Appellees.

BRIEF ON BEHALF OF APPELLEE, COMMERCIAL NATIONAL BANK OF WASHINGTON.

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This is a special appeal from an order of the Supreme Court of the District of Columbia discharging a rule to show cause why an injunction should not be granted enjoining the sale of the Columbia Apartment House, advertised for foreclosure by the trustees under the first deed of trust.

THE PROCEEDINGS IN THE CASE.

On May 21, 1925, the appellees Pope and Lambert caused to be advertised for sale, under the first deed of trust in which they are named as trustees, the apartment house at the Northwest corner of Fourteenth and Girard Streets, Northwest, Washington, D. C., known as the Columbia Apartment House. By the terms of the advertisement the sale was set for Monday, June 1, 1925, at the hour of 5 o'clock P. M.

On May 27th, the Wednesday preceding the Monday set for the sale, the appellant, Francis J. Lukens (hereinafter referred to as the plaintiff), the owner of the equity of redemption in the property, brought his bill in equity against the appellees praying that the trustees be enjoined from offering the property for sale under the deed of trust.

On the same day, May 27th, a rule was issued against all the defendants by the lower court returnable on Friday the 29th at the hour of 10 o'clock.

On Friday, the return day of the rule, all the defendants filed their answers to the bill of complaint and rule to show cause and, upon the record thus made up, a hearing was had before the Justice holding the Equity Court, who, as a result of said hearing, passed an order discharging the rule. It is from this order that the present special appeal has been allowed.

On the following Monday, June 1st, this court, upon the petition of the appellant filed the same day, passed an order allowing a special appeal and providing that "the status quo be maintained *upon the execution of a supersedeas bond in the sum of $50,000 to be given in the court below.*"

At three o'clock the appellant announced to the lower court his inability to give the supersedeas bond required by the terms of this order, and at five o'clock that after-

noon the property was sold by the trustees pursuant to their advertisement.

On June 23, 1925, a motion was filed in this court to dismiss the appeal on the ground that as the plaintiff had failed to give the supersedeas bond required by the order of this court and the property had been sold by the trustees, the question presented by the appeal had become a moot question.

STATEMENT OF FACTS.

The case was heard in the lower court upon the unsupported bill and answers. Three grounds were urged by the plaintiff for the granting of the injunction. They are as follows:

First, that the notes secured by the deed of trust, under which the sale was advertised, had not matured according to the terms of a collateral agreement between the plaintiff and a prior holder of the notes, of which agreement the present holder had notice.

Second, that a contract was created between the plaintiff, and the Commercial National Bank, the present holder of the notes, by a letter of the Bank to the plaintiff bearing date May 22, 1925, and the plaintiff's reply thereto bearing date May 25, 1925, which had the effect of abrogating the contract evidenced by the notes and the deed of trust.

Third, that the plaintiff had tendered the amount of his indebtedness to the defendant the Commercial National Band such tender had been declined by it.

The facts in the case as disclosed by the bill and the answers, are as follows:

The Columbia Apartment House, of which the plaintiff was the owner, was encumbered by three separate deeds of trust. At the time of the bringing of the suit,

the Commercial National Bank was the owner of the notes secured by all three deeds of trust. It had originally been the owner only of the notes secured by the third deed of trust. Later, and while the property was advertised for foreclosure proceedings under the first deed of trust by the National Mortgage and Investment Company, the former holder of the first trust notes, and when the foreclosure proceedings were threatened under the second deed of trust, the Bank, with the knowledge and concurrence of the plaintiff purchased the notes secured by the second deed of trust, which aggregated about $63,000 for the sum of about $45,000. The plaintiff brought a bill in equity against the National Mortgage and Investment Company to enjoin the sale under its trust, upon the ground that he had made an agreement with the Mortgage Company by the terms of which and in consideration of the payment by him of $2,000, the Mortgage Company had agreed to extend the time of payment for three years from October 24, 1924. As the result of this suit a decree was passed in the cause on the 23rd day of April, 1925, the vital part of which is as follows:

> "With the consent of the plaintiff and the National Mortgage & Investment Corporation, it is this 23rd day of April, A. D., 1925, by the Court ordered that the sale of the property involved in this cause, advertised for April 23rd, 1925, be and the same is hereby postponed until the 5th day of May, 1925, at the same hour, and during said period of postponement the property shall be advertised by said trustees at least once in each week, and shall on said 5th day of May, 1925, be by said trustees offered for sale at public auction, in accordance with the terms and provisions of the deed of trust securing the indebtedness therein referred to, unless before said 5th day of May, 1925, the plaintiff shall have paid to the

> defendant, National Mortgage and Investment Corporation, the amount due it on account of said notes aggregating $103,000, principal and interest, together with its costs and expenses in connection with the advertisement for sale of said property, and the costs of this suit."

This decree is referred to in the Bank's answer herein, and made part of the record in this case by stipulation.

As the result of this decree, it became immediately necessary that the appellant make provision before May 5, 1925, for the payment of the notes secured by the first deed of trust and to that end he entered into negotiations with the defendant, the Commercial National Bank. As the result of these negotiations a contract was drawn between Lukens and his wife and the Bank, which provided for the purchase by the Bank of these notes. This contract was finally approved by Lukens about three o'clock in the afternoon of May 5th, the day set for the auction sale of the property, which was scheduled for 5 o'clock. Upon the statement by Lukens that the contract was satisfactory to him, and would be executed by him and his wife and returned to the Bank by six o'clock that afternoon, the Bank purchased the first trust notes that afternoon. After the notes were purchased by the Bank and the immediate danger of a foreclosure sale averted, Lukens declined to execute the agreement, leaving the Bank with the notes on its hands.

During the negotiations leading up to the unsigned contract, the Bank was advised of the suit the plaintiff had filed against the National Mortgage and Investment Company to restrain the foreclosure sale of the property on the ground that the notes offered to the Bank were not due. The Bank, of course, in purchasing the notes, had to protect itself against any renewal of this claim on the part of Lukens. As recited in the answer:

> "It was represented by the plaintiff to this defendant and made one of the conditions of its purchase of said notes, that said notes were overdue and unpaid. That not only was this representation made by the plaintiff to the defendant but at the same time a copy of the decree passed by this court in the case of the plaintiff *vs.* the National Mortgage and Investment Company and known as Equity No. 43,806, and which appeared upon its face to be a final decree, was exhibited to this defendant by the plaintiff's former attorney, Mr. William E. Richardson *as conclusive of this fact.*"

In spite of this, the Bank demanded and the plaintiff agreed to give a letter reciting that these notes were overdue and unpaid and that there were no defenses to them. But in lieu of this letter, it was finally agreed between the plaintiff and the Bank that there should be a recital in the agreement to be drawn to this effect. The agreement, therefore, a copy of which is exhibited with the plaintiff's bill as exhibit No. 3, contains the following recitals—

> "that all of said deeds of trust are recognized by the said Francis J. Lukens as valid subsisting liens upon said property for the respective amounts indicated and are hereby represented by the said Francis J. Lukens to the party of the first part to be such;"

and

> "AND WHEREAS, the above mentioned first deed of trust aggregating approximately $103,000 upon the Columbia Apartment House is overdue and unpaid, and the Trustees under said deed of trust have advertised the property for foreclosure sale by public auction on the 5th day of May, 1925, at the hour of —— o'clock P. M.;"

This recital was in the contract when it was finally approved by the appellant and was acquiesced in by him and the bank purchased the notes upon the unequivocal promise of the plaintiff to execute, before six o'clock that afternoon, the agreement as drawn.

Upon the refusal of the plaintiff to execute this agreement after the Bank, relying upon his promise to do so, had purchased the notes, the plaintiff commenced correspondence with the Bank with the object of negotiating an entirely new and different contract from the one agreed upon.

In the course of this correspondence the Bank submitted to the plaintiff a proposition outlined in its letter to him of May 22, 1925. It is contended on behalf of the plaintiff, but denied by the Bank, that the plaintiff's reply to this letter, under date of May 25, 1925, is an acceptance of the Bank's offer. These two letters are in the record and will be commented upon in the argument.

It is further contended on behalf of the plaintiff that in this correspondence he tendered payment to the Bank of the amount of his indebtedness to it. These letters also will be discussed in the argument.

ARGUMENT.

It is respectfully submitted—

1. That the plaintiff having neglected to give the supersedeas bond in the lower court as required by the order of this court of June 1, 1925, as a condition precedent to the sale in question being stayed, and the property having been sold by the trustees pursuant to their advertised notice of said sale, the question before the court on this appeal has become a moot question, and therefore the defendant's motion to dismiss the appeal should be granted.

2. That should the court be of the opinion that the question is not a moot question but properly before this court for decision, the record discloses no grounds entitling the plaintiff to the injunctive relief prayed.

HAS THE POINT PRESENTED ON APPEAL BECOME A MOOT QUESTION?

The appeal is from the order of the lower court discharging the rule to show cause why an injunction should not issue. The question, therefore, presented to this court is whether the trial court committed error in discharging the rule instead of granting the injunction. If this court should be of the opinion that the trial court did commit error in this respect, it would necessitate a reversal of the order of the lower court. This would mean that the lower court would be directed by mandate of this court to issue the injunction upon the showing made. The injunction so granted would be addressed to the trustees under the deed of trust, commanding them not to foreclose the trust by selling the property, until further order of the court. But as the plaintiff neglected to file the supersedeas bond required by this court and as the property has consequently already been sold, it is submitted an injunction of this kind could not issue. It is quite obvious that the trustees cannot be enjoined from doing that which with the full sanction of this court and the lower court they have already done.

There is nothing upon which an injunction issued by the lower court could operate. This court will dismiss an appeal, or refuse to grant relief by way of reversal if the questions involved in an appeal have become moot questions. Peck *vs.* Fink, No. 4225—Appeal dismissed by this court May 29, 1925. Whaley *vs.* Norment et al., No. 4268, affirmed June 1, 1925, by this court.

THE GROUNDS OF THE PLAINTIFF'S CLAIM TO INJUNCTIVE RELIEF.

As before observed the plaintiff urged three grounds for the relief he seeks:

1. That the notes secured by the trust sought to be foreclosed are not due;

2. That the plaintiff and the bank, as the holder of the notes, have made an independent agreement respecting the payment of the notes evidenced by the bank's letter of May 22nd and the appellant's reply of May 25th; and

3. That the plaintiff has tendered payment of his indebtedness to the bank.

The validity of all of these contentions is denied.

These claims of the plaintiff will be considered in order:

I. WAS THERE SUCH DEFAULT IN THE PAYMENT OF THE NOTES OR INTEREST AS WARRANTED A FORECLOSURE OF THE TRUST?

The notes by their terms matured October 19, 1924. The appellant contends that he contracted for a three-year extension of the notes with the National Mortgage and Investment Corporation, the former holders. This claim he makes in his first bill to enjoin the sale brought against the National Mortgage and Investment Corporation and the Trustees under the first deed of trust. The proceedings in that cause are made a part of the appellant's bill of complaint although copies were not physically filed in this cause. On April 3, 1925, a consent decree was passed in that cause in the following terms:

> "With the consent of the plaintiff and the National Mortgage & Investment Corporation, it is this 23rd

> day of April, A. D., 1925, by the Court ordered that the sale of the property involved in this cause, advertised for April 23rd, 1925, be and the same is hereby postponed until the 5th day of May, 1925, at the same hour, and during said period of postponement the property shall be advertised by said trustees at least once in each week, and shall on said 5th day of May, 1925, be by said trustees offered for sale at public auction, in accordance with the terms and provisions of the deed of trust securing the indebtedness therein referred to, unless before said 5th day of May, 1925, the plaintiff shall have paid to the defendant, National Mortgage and Investment Corporation, the amount due it on account of said notes aggregating $103,000, principal and interest, together with its costs and expenses in connection with the advertisement for sale of said property, and the costs of this suit."

It certainly cannot be successfully contended that this is not a final decree in the cause. If it were not a final decree in the case, the court would be in the position of passing an interlocutory order directing the sale of property upon a bill, the sole object of which was to enjoin.

Further, whether the decree was a final decree or not, it is submitted that the plaintiff by his conduct has equitably estopped himself from denying that the notes were overdue. As he has induced the Bank to purchase the notes upon his promise to sign a contract which recited that the notes were overdue, and as his attorney in the equity cause in question had represented the decree by way of further assurance to the Bank that the notes were so overdue to be a final decree, the plaintiff will not be heard, after refusal to sign the contract, to assert that the notes had not matured.

Bispham in his work on Equity Jurisprudence, Ninth Edition, page 480, says:

> "Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, *unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right.*"

In his notes he cites the following from Patterson *vs.* Lytle, 11 Pa. 56:

> "The principle runs through the whole doctrine of estoppel that a man is only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to *action* by the other party which would result in loss if the opponent was permitted to gainsay what he had before asserted, or induced the other to believe by his acts."

The last application of this principle by this Court was in the case of McGrath *vs.* McGrath, 53rd Wash. Law Rep. Page 306, decided March 2nd of this year.

Whether the notes were overdue or not the answer avers that the interest was overdue and unpaid which constitutes a default under the deed of trust. In paragraph 4 of the answer, it is averred:

> "that a six month's installment of interest on said notes matured April 19, 1925, and remains unpaid."

II. WAS THE BANK'S OFFER CONTAINED IN ITS LETTER OF MAY 22, 1925, ACCEPTED BY THE DEFENDANT'S LETTER OF MAY 25, 1925?

It is submitted that a reading of the two letters leaves nothing for argument on this point. The proposition in the Bank's letter of May 22, 1925, is as follows:

> "The proposition we submitted to Mr. Jackson, and which you refer to in the second numbered paragraph of your letter, is that we will release the property from the liens of all three trusts, upon the payment by you to us of the amounts due us under the first and third trusts, plus the sums of money with interest which we have actually paid out in connection with the property at 14th & Belmont Streets, together with the amount of our purchase price of the notes secured by the second trust, with interest on that payment to the time of settlement, and that, upon such payments being made to us and our being relieved from all liability with reference to the contract for the sale of the property at 14th & Belmont Streets, we will convey to you the equity in the property at 14th & Belmont Streets (subject to the two existing deeds of trust thereon) the title to which we now hold as additional security for your notes secured by the third deed of trust upon the Columbia Apartment House. This proposition is for immediate acceptance and full performance by ten o'clock in the forenoon June 1, 1925, the day set for the auction sale of the apartment building."

This, of course, means that if the plaintiff would pay in cash the amounts indicated, and within the time indicated, the Bank would accept the sum of these amounts in satisfaction of the plaintiff's debt. The plaintiff's reply to this letter commences:

> "Replying to your communication of the 22nd instant, through your Mr. Donaldson, I beg to advise as follows:"

The letter then proceeds to make what is characterized as a "tender of payment" of the amount of the first trust saying—

> "that my ability to make good this tender is dependent upon your willingness to wait until a com-

petent title company can report upon and have executed the necessary papers in connection with the new loan of $110,000 as a first trust that I am now offered upon this property, and out of which I propose to pay you your first trust, with interest in full, as indicated in more detail in my communication to you of the 19th instant. I assume, therefore, you are willing to wait until this matter can go through the title company in regular course."

The letter continues—

"I also understand from your communication of the 22nd instant that Mr. Jackson has correctly reported your Mr. Donaldson, to the effect that he will release this property from the lien of the second trust upon the payment by me to you of the amounts paid by you for said second trust notes, plus the interest on said payment to date. The performance of this tender by me, however, cannot be accomplished by June 1, 1925, as you indicate, but will be subject to the ability of a competent title company to make a report on this title and prepare, have executed and recorded, the necessary papers."

With reference to the third deed of trust which the offer of the Bank required to be paid in cash on or before June 1, 1925, the letter says—

"*My obligations to you under the third trust were settled by the agreement between us of February 21, 1925,* to which reference has been made in paragraph 1 hereof, *the terms of which I propose to continue, as heretofore, to comply with in all respects.*"

The effect of the letter, therefore, is that the amount of the first trust will be paid not within the time limited by the offer but when the plaintiff can secure a new loan upon the property; the amount agreed to be accepted

under the second trust will be paid not within the time limited but will be subject to the ability of a competent title company to make a report on the title; *the amount of the third trust will not be paid at all* but will remain subject to the agreement between the parties of February 21, 1925, a copy of which appears in the record and which provides for the carrying of the obligation for an indefinite period. Notwithstanding the plaintiff's admission in this letter of his inability or unwillingness to comply with the terms of the Bank's offer, the letter concludes as follows:

> "I understand and intend the above to be *a full and complete compliance with the terms of your communication of the 22nd instant*, and I will expect to be advised promptly that you so interpret this communication."

In its immediate answer to this letter, the Bank says:

> "We acknowledge the receipt of your letter of the 25th instant in reply to ours of the 22nd.
>
> "We note that you conclude your letter with the statement that you understand and intend it to be in full and complete compliance with the terms of our communication of the 22nd and ask that we advise you promptly that we so interpret it.
>
> *"We do not so interpret your letter and do not see upon what theory it can be so understood. This conclusion is too obvious from a reading of the two letters to warrant comment."*

These two letters are the ones in which the plaintiff attempts to justify the following extraordinary paragraphs in his petition for the allowance by this court of a special appeal (quoting from his bill of complaint):

"15. *Notwithstanding the ability of the plaintiff to pay in full all the indebtedness against this property held by the defendant, the Commercial National Bank, arrangements for which have been perfected,* the defendant, the Commercial National Bank, has failed and refused to withdraw said advertisement of sale, and has failed and refused, and continues *to fail and refuse to execute the conditions set forth to this plaintiff in its communication of May 22, 1925, which was duly accepted by the plaintiff in his communication to said defendant bank on May 25, 1925, already referred to.*"

and in paragraph 5:

"Your petitioner further represents that without the interference of this Honorable Court he will be deprived of the rights and immunities secured to him by the decisions of this court, and that he will suffer irreparable property loss by reason of said sale, *notwithstanding he was in a position when said bill of complaint was filed, and is now in a position to discharge the entire indebtedness of the respondent bank in full, as alleged in his bill of complaint.*"

THE ALLEGED TENDER BY THE PLAINTIFF OF THE AMOUNT OF HIS INDEBTEDNESS, OR ANY PART OF IT, TO THE BANK.

It is needless in disposing of this contention on the part of the plaintiff to do more than quote that paragraph of the Bank's reply to the plaintiff's letter in which he contends a tender of the amount of his indebtedness was made:

"In your letter you state that you tender payment of the amount of the first trust held by us upon the apartment house with interest and agree to indem-

> nify us against our liability, if any, to the trustees under that trust growing out of the two advertisements of the property by them. As this statement of tender is unaccompanied by any cash there is, of course, nothing for us to accept or decline. However, we now state to you that we are perfectly willing to accept from you the amount due us under the first deed of trust, including such expenses as we have incurred in connection therewith and which are, by the terms of the deed of trust, covered by the lien thereof, providing this amount is tendered us before the auction sale of the property, which is advertised for June 1, 1925, at the hour of five o'clock P. M."

When it appeared to the lower court that the alleged tender was merely a tender of willingness on the part of the appellant to raise the money with which to discharge the bank's indebtedness, that court declined to hear argument upon the question as to whether this constituted a tender.

In conclusion it is respectfully submitted that the notes secured by the first deed of trust upon the property in question were overdue or, if they were not, that the plaintiff had estopped himself from asserting that they were not, and, whether they were or were not overdue, it is undenied in the record that the interest on them was overdue and, therefore, a default had occurred which authorized the foreclosure of the trust; that the offer of the bank to the plaintiff in its letter of May 22, 1925, was not accepted by the plaintiff and therefore, no independent contract was created between them; and that the plaintiff has not made a tender to the bank of payment of his indebtedness to it, or of any part thereof. It is further respectfully submitted that the plaintiff is, by his present proceeding, endeavoring to take advantage of the position he has induced the bank to occupy by his

unfulfilled promise to do that which furnished the inducement for the Bank's action in purchasing the notes and thus saving temporarily the plaintiff's property from foreclosure sale; and that for these reasons the action of the court below in discharging the rule to show cause was correct and, if this appeal is not dismissed, its order discharging the rule should be affirmed.

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